United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 24, 1998

TO : James S. Scott, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Union Local 287 (Bergen Brunswig Corporation)
Case 32-CB-4918

554-1467-2400
554-1467-2410
554-1467-9650

This case was submitted for advice as to whether the Union violated Section 8(b)(3) of the Act by its dilatory tactics in bargaining.

FACTS

Bergen Brunswig Corporation (the Employer), a pharmaceutical wholesaler, and Teamsters Union Local 287 (the Union) have had a series of collective-bargaining agreements covering a unit of drivers and warehouse personnel, the most recent of which was scheduled to expire by its terms on May 31, 1996, with an extension to July 11, 1997. Bargaining for a successor agreement began in June 1996, at which time the Employer requested concessions due to a decline in business, including reductions in drivers' wages and the substitution of company pension and health and welfare plans for Teamsters plans.

Between June 1996 and December 1996, the Union was represented in bargaining by its local president and met with the Employer on five occasions for a total of approximately 15 hours of bargaining. Beginning on December 31, 1996, the Union was represented in bargaining by its attorney, David Rosenfeld. Between that date and August 1997, the parties met on four occasions for a total of less than ten hours of bargaining. During this period, the Employer repeatedly requested more frequent and longer bargaining sessions and proposed dozens of additional dates for bargaining sessions. The Union canceled the first scheduled bargaining session, regularly arrived late at other sessions, left them early, and caucused separately for much of their time.

The parties met again on September 8, 1997. At this session, the parties discussed the recently-announced tentative merger between the Employer and Cardinal Health, another pharmaceutical wholesaler. Rosenfeld suggested that they suspend bargaining until the merger was completed, but the Employer demanded that they continue to bargain, particularly because it was unclear whether government regulators would allow the merger to proceed. Also at this session, Rosenfeld made the Union's first counterproposal -- that the Employer reduce drivers' wages by $.50 per hour until the merger was completed or July 1, 1998 (whichever came first), with the Employer retroactively restoring the lost wages and a $.25 per hour raise thereafter. The Employer rejected this proposal and requested that the Union offer a comprehensive counterproposal; after such a proposal was ready, the parties would meet again.

The Union did not contact the Employer to schedule a bargaining session until at least April 1998,[1] despite a December 1997 letter in which the Employer stated:

> When we last met, I voiced my frustration at your delaying tactics and surface bargaining and asked that you call us when you were ready to respond to the offer that we've had on the table for months. It's evident that you're continuing your pattern of delaying and surface bargaining and I continue to be disappointed.

On February 3, 1998, after almost five months in which the Union failed to make a counterproposal or schedule further bargaining, the Employer threatened to implement its standing proposal if the Union did not respond. Rosenfeld wrote back claiming that the parties had agreed to hold negotiations in abeyance because of the pending

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[1] The Union did continue to make information requests, as it had since Rosenfeld took over bargaining for the Union. The Union apparently does not argue, and it does not appear on the record before the Division of Advice, that the lack of any requested information impeded the Union's ability to bargain. If the Employer failed to provide any information to the Union that was relevant and necessary for collective bargaining, the Region should resubmit this matter.

merger. The Employer thereafter again requested that the Union prepare a counteroffer and schedule negotiations.

On March 9, 1998, the Employer notified the Union that the Federal Trade Commission had voted to oppose the merger between the Employer and Cardinal. In this and other correspondence over the next several weeks, the Employer stated that it believed the parties were at impasse, based upon certain statements it claimed were made by a Union official and the Union's other conduct.[2] The Union repeatedly responded denying there was an impasse, stating that they were willing to meet, and claiming that the Employer had not bargained in good faith.[3] During this period, the Union proposed no dates for meetings, except for an offer dated April 5, 1998, to meet for up to four hours on April 10, 1998 -- Good Friday.

On February 4, 1998, the Employer filed the charge in the instant case. As part of the Region's investigation, Rosenfeld declared that, after the September 8, 1997, meeting, the Union did not request further bargaining sessions pending the Employer's merger based upon the Union's belief that the merger would have a substantial impact on the course of negotiations and the Union's satisfaction with the status quo.

ACTION

We conclude that the Union violated Section 8(b)(3) of the Act by its dilatory tactics in bargaining.

Section 8(b)(3) of the Act provides that a union violates the Act when it refuses to bargain with the employer of the employees it represents. Section 8(b)(3)

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[2] The Union official allegedly said that the Union "would not accept a pay cut . . . nor would it convert to the Company's health & welfare or retirement plans in lieu of the Union plans."

[3] The Union has filed a charge (Case 32-CA-16709) alleging that the Employer violated Section 8(a)(5). The Region dismissed this charge, and the Union's appeal is pending in the Office of Appeals

must be read in conjunction with Section 8(d), which expressly defines the bargaining obligation to include a requirement to meet at reasonable times and confer in good faith. "As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes 'that had been condemned in management' by the previously enacted Section 8(a)(5)."[4]

It is well established that the statutory duty to bargain "surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring."[5] Thus, the Board has specifically rejected the "busy schedule" or "busy lawyer" defense, emphasizing that a party in collective bargaining must "display a degree of diligence and promptness in arranging for the elimination of obstacles thereto comparable to that which he would display in his other business affairs of importance."[6] Where one side in collective bargaining establishes a pattern of negotiations exemplified by "[s]ubstantial delays between the briefest of meetings," that party violates its Section 8(d) obligation.[7]

Such a description accurately describes the Union's conduct in the instant case, both before and within the Section 10(b) period, which began on August 4, 1997. Between December 31, 1996, and August 1997, the parties met on only four occasions for a total of less than ten hours of bargaining, despite the Employer's repeated requests for more frequent and longer bargaining sessions and proposal

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[4] Food & Commercial Workers Local 1439 (Layman's Market), 268 NLRB 780, 784 (1984), quoting NLRB v. Insurance Agents, 361 U.S. 477, 487 (1960).

[5] Storer Communications, 294 NLRB 1056, 1095 (1989), quoting Rutter-Rex Mfg. Co., 86 NLRB 470, 506 (1949).

[6] Barclay Caterers, 308 NLRB 1025, 1035-36 (1992).

[7] Id. at 1035.

of dozens of additional dates for bargaining sessions.[8] The Union canceled the first scheduled bargaining session, regularly arrived late at other sessions, left them early, and caucused separately for much of their time. While the Union's conduct during this period may not be the subject of a complaint, it does indicate the Union's clear intention to avoid bargaining.

After the onset of the Section 10(b) period, the Union's unlawful posture is even more apparent. Between August 4, 1997, and at least April 5, 1998, a period of at least 8 months, the parties met only once, despite the Employer's consistent call for negotiations. Indeed, the only meeting the Union proposed during this entire period was up to four hours on April 10, 1998 -- Good Friday.

The Union has argued that it should not be considered to have unlawfully delayed bargaining in the period after the parties' September 8, 1997, meeting, because the planned merger of the Employer excused the Union from its bargaining obligation.[9] In fact, Rosenfeld himself has declared that the Union did not request further bargaining sessions pending the Employer's merger based upon the Union's unilateral belief that the merger would have a substantial impact on the course of negotiations and its unilateral satisfaction with the status quo, and the Union has not offered any legal support for a Union's refusal to bargain based upon such a unilateral belief.

Moreover, the Union's conduct before and after this period belies any assertion of good faith. In addition to the clear failure to meet at reasonable times demonstrated by the Union's agreement to appear at only five meetings for a total of less than thirteen hours of bargaining in

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[8] Cf., Id. at 1035 (employer violated Section 8(a)(5) by failure to meet at reasonable times where the union "did everything but beg for meeting dates").

[9] The Union initially argued that the parties had agreed to suspend bargaining at the September 8 meeting, consistent with its earlier claim to the Employer. The Union no longer takes this position, and it does not appear to be supported by any evidence.

more than fifteen months,[10] despite the Employer's repeated requests for more frequent and longer bargaining sessions and proposal of dozens of additional dates for bargaining sessions, it is significant that the Union did not even respond to the December 1997 letter in which the Employer stated:

> When we last met, I voiced my frustration at your delaying tactics and surface bargaining and asked that you call us when you were ready to respond to the offer that we've had on the table for months. It's evident that you're continuing your pattern of delaying and surface bargaining and I continue to be disappointed.

Even after, the Employer threatened to implement its standing proposal if the Union did not respond and prepare a counteroffer and schedule negotiations, the Union failed to make any movement in this regard other than the proposal of one date for a meeting, for no more than four hours, on April 10, 1998 -- Good Friday. Therefore, considering the totality of its conduct, we conclude that the Union violated Section 8(b)(3) of the Act by failing and refusing to meet with the Employer at reasonable times for the purposes of collective bargaining.[11]

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[10] Cf., e.g., Calex Corp., 322 NLRB 977 (1997), enfd. 158 LRRM 2223 (6th Cir. 1998) (employer violated Section 8(a)(5) by failing and refusing to meet at reasonable times where parties had 19 bargaining sessions in 15 months).

[11] Our conclusion that the Union has violated Section 8(b)(3) is based solely on the Union's conduct, which demonstrates unlawful delay and an intent to avoid good-faith bargaining with the Employer. It is not in any way grounded upon Mr. Rosenfeld's monograph entitled "Offensive Bargaining." That document advocates no unlawful conduct and makes it clear from the outset that it only presents "a strategy to combat the employer who comes to the table with little or no intention of bargaining," as well as "bargaining techniques to deal with the illegally motivated employer," and that the tactics he discusses must be undertaken "with the goal not of violating the law, but instead, the goal of exposing and counter-attacking the law-breaking employer's attempts to destroy a fair

Accordingly, complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(3) of the Act by its dilatory tactics in bargaining.

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bargaining relationship and to avoid a fair contract." Thus, Rosenfeld's monograph provides no additional support to our conclusion that the Union unlawfully refused to meet at reasonable times and the Region should not rely upon it as evidence of the Union's unlawful conduct.